IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants,

v.

BARLOW'S INC.

On Appeal from the United States District Court for the District of Idaho

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED—Continued

TABLE OF AUTHORITIES CITED—Continued

Constitution and Statutes:

TABLE OF AUTHORITIES—Continued

Rules:

Regulations and Interpretations:

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States and is a principal spokesman for the American business community. The Chamber of Commerce has a direct membership of more than 3700 state and local chambers of com-

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

merce and professional and trade associations, and over 65,000 business firms.

In order to represent its members' views on questions of importance to their vital interests and to provide such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in numerous cases of constitutional importance.

The threshold constitutional issue presented in this case, whether warrantless inspections conducted under the Occupational Safety and Health Act of 1970 violate the Fourth Amendment, is of significant interest to members of the Chamber both in their role as employers, and as individuals. It is important to employers because reversal of the lower court's decision would signal a broad repeal of the Fourth Amendment protections traditionally applicable to businesses. It would mean that any company, regardless of its size or the nature of its activities, would be subject to warrantless administrative inspections in furtherance of any governmental purpose, without any reason to believe that the subject of the inspection is within the scope of official scrutiny.

It is important to members of the Chamber as individuals because such a substantial diminution in basic constitutional protections in one sector ultimately affects everyone. History and experience have borne this out time after time. It is precisely for this reason that this Court has counseled resolute loyalty to constitutional safeguards when balanced against the pressure of governmental interests that encroach on basic Fourth Amendment rights. This is particularly significant where, as in this case under OSHA, the valid public interest in protecting employees may be achieved within the framework of a warrant procedure without frustrating the laudable goals of the Act.

For these reasons, the Chamber respectfully submits this brief in support of Appellee's contention that the decision below should be affirmed.

SUMMARY OF THE ARGUMENT

I

The authority to conduct administrative searches and otherwise administer regulatory schemes is predicated on a congressional determination that to protect the public interest, particular commodities or endeavors should be controlled. Nevertheless, the mere existence of a valid regulatory scheme of itself cannot derogate constitutional safeguards against unreasonable searches and seizures. To be considered reasonable, that authority must be evidenced by a search warrant, signed by a neutral magistrate who has determined that there exists a level of probable cause sufficient to justify the inspection. Neither Congress nor public opinion are free to suspend constitutional protections by either statutory enactment or popular referendums. See, *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

The general rule, that random warrantless administrative inspections of business establishments are unreasonable unless supported by a search warrant, clearly applies to the facts of this case. *Camara* v. *Municipal Court*, 387, U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541. All of the concerns expressed by the Court in *Camara* and *See* are present here. The unreviewed discretion of administrative officials to conduct searches, the potential for abuse, and the failure of statutory safeguards to provide meaningful protection dictate that the rule be applied to inspections under OSHA.

None of the exceptions to the warrant requirement of the Fourth Amendment are justified by the circumstances here presented. When the entire statutory scheme is considered as a whole, it is clear that to require a warrant

for such random, routine inspections will not frustrate the purposes of the Act. Nor does the statute fall within the extremely narrow exception enunciated by the Court in *United States* v. *Biswell*, 406 U.S. 311, as is made clear by subsequent cases. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, *G.M. Leasing Corp.* v. *United States*, 50 L. Ed. 2d 530; Cf. *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 418 U.S. 861.

II

The Secretary's own contemporaneous interpretation of the Act supports the decision below that the Fourth Amendment requires a warrant be obtained where consent to inspect is denied. That this interpretation was reaffirmed by the Secretary long after the decisions on which he now relies is most persuasive, if not controlling. See, *e.g. Skidmore* v. *Swift and Co.* 323 U.S. 134, *General Electric Co.* v. *Gilbert*, 97 S. Ct. 401.

III

The pertinent legislative history supports the decision below that Congress specifically authorized warrantless administrative inspections in contravention of the Fourth Amendment. Accordingly, the lower court was correct in refusing to judicially re-draft the statute to cure its constitutional infirmity.

ARGUMENT

I. A RANDOM ADMINISTRATIVE INSPECTION OF COMMERCIAL PREMISES CONDUCTED PURSUANT TO THE PROVISIONS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, WITHOUT A SEARCH WARRANT ISSUED UPON PROBABLE CAUSE, CONTRAVENES THE REQUIREMENT OF THE FOURTH AMENDMENT.

A. *The Inspection Provisions of the Act Are Not Exempt From the Warrant Requirement of the Fourth Amendment.*

In enacting the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et. seq.*, hereinafter OSHA or the Act) Congress made the finding "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. 651. Thus, Congress established as its purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. 651(b). To effectuate this broad purpose, the Act provides inspection and enforcement procedures which allow administrative inspectors, upon presenting appropriate credentials, to enter the premises of all workplaces covered by the Act[2] for the purpose of inspecting and investigating working conditions. Section 657(a) of the Act provides:

> (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate creden-

[2] As one Senator has observed OSHA applies to "every business affecting Commerce in the entire United States, ranging anywhere from a big steel company to a shoeshine shop." 116 Cong. Rec. 36,509 (1970) (Remarks of Senator Dominick).

tials to the owner, operator, or agent in charge, is authorized—

> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

The Act imposes upon the employer the duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," and to comply with the occupational safety and health standards promulgated under the Act. 29 U.S.C. § 654(a)(1), (2). If an inspector "believes" a violation of this section exists, he is required to issue a citation. 29 U.S.C. § 658(a). Violations of the Act may result in criminal as well as civil liability. 29 U.S.C. § 666(a)-(e). In addition, one who interferes with or impedes a government officer, including an OSHA inspector, while engaged in the performance of his duties is subject to a fine and/or imprisonment. 18 U.S.C. §§ 111, 1114.

It is with this background that the Act must be tested against the fundamental rights guaranteed by the Fourth Amendment. Significantly, in addition to the lower court, the vast majority of other federal courts that have balanced the public interest sought to be advanced by the Act against the fundamental rights guaranteed by the

Fourth Amendment, have concluded that constitutional safeguards against significant intrusions into the rightful expectations of privacy must prevail. *Marshall* v. *Shellcast Corporation, et. al.* No. 77-P-0995-E (N.D. Ala., July 26, 1977); *Marshall* v. *Great Lakes Dredge and Dock Co.*, No. Misc. 785 (S.D. Calif., July 11, 1977); *Usery* v. *Centrif-Air Machine Company, Inc.*, 424 F. Supp. 959 (N.D. Ga., 1977), appeal pending, C.A. 5, No. 77-1511; *Dunlop* v. *Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D. N.M., 1976) (three judge court), appeal pending, C.A. 10, No. 76-2020; *Usery* v. *Rupp Forge Co.*, No. C-76-395 (N.D. Ohio, April, 1976), appeal pending, C.A. 6, No. 76-1960; *Brennan* v. *Gibson Products, Inc., of Plano*, 407 F. Supp. 154 (E.D. Tex., 1976) (three judge court), appeal pending, C.A. 5, No. 76-1526.[a]

Similarly, six state courts have held that state inspection provisions analagous to those of the Act are either unconstitutional or require enforcement within the framework of a warrant procedure. See, *State ex rel. New Mexico Environmental Improvement Agency* v. *Albuquerque Publishing Co.*, No. 9-76-04397, (Second District, January 20, 1977); *Yocom* v. *Burnette Tractor Co., Inc.*, No. CA-366-MR (Ky. Ct. of App., May 27, 1977); *Epstein* v. *Fitzwater*, No. 6838EQ (Cir. Ct. Garrett County, Md., September 2, 1976); *Oregon* v. *Keith R. Foster, dba Keith Mfg. Co.*, Civ. No. 5493 (Cir. Ct. Jefferson County, Ore., November 1, 1976); *Alaska* v. *Alaska Truss and Millwork*, No. 2903 (Alaska Supreme Ct., June 2, 1977); *R. Lamar Baird, et. al.* v. *State of Utah, et. al.*, Civ. No. 237878 (Third Judicial District, January 20, 1977).

The common rationale on which these decisions are based is the recognition of the long standing "governing

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[a] *Contra; Brennan* v. *Buckeye Industries*, 374 F. Supp. 1350 (S.D. Ga. 1974); *Dunlop* v. *Able Contractors, Inc.*, No. 25-57-BLG (D. Mont., Dec. 15, 1975), appeal pending, C.A. 9, No. 76-1615.

principle . . . [which] has consistently been followed [that], except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been evidenced by a valid search warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); *G.M. Leasing Corp.* v. *United States*, —— U.S. ——, 50 L. Ed. 2d 530, 543 (1977).

In the *Camara* case, the defendant had been convicted for violating a municipal ordinance by refusing to permit building inspectors to inspect his residence without a warrant, and in the *See* case, the defendant had been convicted for violating a municipal ordinance by refusing to permit a fire department representative to inspect his commercial warehouse without a warrant. Overturning each of these convictions, the Court concluded, *inter alia*, that administrative searches under fire, health, or building inspection programs were significant intrusions upon the interests protected by the Fourth Amendment; that the Fourth Amendment forbids warrantless inspections of commercial structures as well as private premises, and that a citizen had a constitutional right to insist that a search warrant be obtained prior to the inspection of his premises or business establishment. The Court summarized its holding in *Camara* as follows (387 U.S. at 534):

> We hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guaranteed to the individual, *and that reasons . . . for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections.* (Emphasis added).

In *See* v. *City of Seattle*, *supra*, the Court stated that the only question presented to it was whether the principles enunciated in *Camara* are equally applicable to administrative inspections of commercial premises which are not used as private residences. Holding that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled . . . within the framework of a warrant procedure" (387 U.S. at 545), the Court explained:

> . . . [w]e see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. *The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violations of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.* Id. at 543 (Emphasis added).

That OSHA "embodie[s] precisely the evil the Court saw in *Camara* when it insisted" that a warrant be obtained is clear (*Almeida-Sanchez*, *supra* 413 U.S. at 270), despite the Secretary's assertions to the contrary. Thus, the fact that the decision to inspect is not left to the discretion of the enforcement officer in the field, but is made by some other administrative official based on policy guidelines established by the Secretary is irrelevant. (Brief of Appellant at 7, 37). As appropriately stated by this Court in *United States* v. *United States District Court*, 407 U.S. 297, 317:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disin-

> terested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. (See, also, *Almeida-Sanchez*, *supra*, 413 U.S. at 280 (Powell, J. concurring.))

In conjunction with the above the Secretary also asserts that since routine inspections are to be conducted on a representative basis, and the Act clearly defines the scope and authority of the inspector, there are no questions of disputed facts in the search situation here in issue for a magistrate to resolve (Brief of Appellant 36-37). However, it is clear that the compliance officer *has* unlimited discretion in deciding which areas of a particular factory are to be searched. If a question arises concerning the applicability of the Act to such an area the owner in question has no way of determining whether the officer's insistence that such area be inspected is within lawful limits. This is precisely the question which a magistrate could, and should, be called upon to answer. Cf. *G.M. Leasing Corp.* v. *United States*, *supra*, 50 L.Ed. 2d at 546.

Finally, it is argued that the provisions of the Act authorizing inspections are "hedged with safeguards" and that to require a warrant would provide no meaningful protection for an employer's privacy interest in addition to those already provided by the Act and regulations. See, *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 531. These safeguards require an inspector to present "appropriate credentials to the owner, operator or agent in charge" (29 U.S.C. 657(a))[4] and direct that an employer be given the opportunity to accompany the inspector during his inspection of the workplace (29

[4] The San Francisco Code also required that the inspector display proper credentials and inspect only at reasonable times. *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 531, n. 9.

U.S.C. 657(e)). In addition, agency regulations require the inspector to explain the nature, purpose and scope of the proposed inspection. 29 C.F.R. § 1903.7(a). However, it is significant to this issue to note that these so called "safeguards" have been held to be "procedural" rather than substantive, and failure by the inspector to abide by them has been deemed insufficient grounds for according the employer the protection afforded by the Fourth Amendment. *Marshall* v. *Western Waterproofing Co. Inc.*, —— F. 2d ——, No. 76-1703 (8th Cir., Aug. 23, 1977); *Accu-Namics, Inc.* v. *Occupational Safety and Health Review Commission*, 515 F. 2d 828 (5th Cir. 1975) *cert. denied*, 425 U.S. 903; *Chicago Bridge and Iron Co.* v. *Dunlop*, 535 F. 2d 371 (8th Cir., 1976); *Hartwell Excavation* v. *Dunlop*, 537 F. 2d 1071 (9th Cir., 1976). Accordingly, if it is held that the Fourth Amendment does not apply to OSHA inspections then an employer's right to privacy may be violated with impunity.

That the Court would not countenance such a result is evident from its discussion in *Camara* where, in responding to arguments almost identical to those put forth by the Secretary, it concluded (387 U.S. at 532-533):

> In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry the occupant has no way of knowing whether enforcement . . . requires inspection of his premises, no way of knowing the lawful limits of the inspector's powers to search, and no way of knowing whether the inspector himself is acting under proper authorization. *These are questions wihch may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area.* (Emphasis added).
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> The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. *This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.* We simply cannot say that the protections provided by a warrant procedure are not needed in this context; *broad statutory safeguards are no substitute for individualized review* . . . (Emphasis added).

Thus, all the concerns expressed by the Court in *Camara* and *See* apply with equal force to OSHA inspections, and the requirement of a warrant must be imposed if the rule enunciated in these cases is to have any continuing validity. Such a requirement, when read in light of the Court's discussion pertaining to the reasonable standard of probable cause applicable to such warrants, "merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy." (*Camara, supra* at 539).

Based on the foregoing, it is not surprising to find that the courts, in dealing with a number of federal statutes other than OSHA, have consistently upheld the rule that an authorized, non-consensual administrative inspection of commercial premises may only be accomplished upon presentation of a warrant based upon an appropriate standard of probable cause. *United States* v. *Thriftmart, Inc.*, 429 F. 2d 1006 (9th Cir., 1970); cert. den. 400 U.S. 926, reh. den. 400 U.S. 1002 (1970); *United States* v. *J. B. Kramer Grocery Company*, 418 F. 2d 987 (8th Cir., 1969); *United States* v. *Hammond Milling Co.*, 413 F. 2d 608, (5th Cir. 1969); cert. den. 396 U.S. 1002; *United States* v. *Anile*, 352 F. Supp. 14 (N.D.

W.Va. 1973); *Klutz* v. *Beam*, 374 F. Supp. 1129 (W.D. N.C., 1973).[5]

That this Court continues to "adhere to *Camara* and *See*" as the governing rule in warrantless inspections of business premises is beyond dispute. *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 864 (1974); Cf., *G.M. Leasing Corp. supra* at 543. Indeed, the context of this specific reaffirmance of *Camara* and *See* is noteworthy. The situation involved an inspection under a pollution control statute, legislation similar to OSHA in that its highly regulated standards apply across the board to numerous industries. The Court held that since the violative condition was visible to the general public, an exception to the Fourth Amendment analagous to the "open fields" doctrine was applicable to the facts of that case. However, in emphasizing the continued validity of *Camara* and *See*, this Court clearly indicated its concern over the intrusion into privacy that would have resulted if the inspection had been made inside the plant in areas from which the public was excluded, and the violation was not open to public view, as is the case with the vast majority of OSHA inspections.

In point of fact, OSHA is precisely analagous to the regulatory schemes involved in *Camara* and *See*. Both dealt with health and safety inspections, just as OSHA does; both involved random area-wide searches not focusing on individual persons or particular industries, equivalent to the broad sweep of OSHA; and the fire and health codes in *Camara* and *See* had as their principle objective securing compliance rather than prosecution, as does OSHA.[6] Moreover, the inspection schemes involved in

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[5] See, also, *U.S.* v. *Hart*, 359 F. Supp. 835 (D. Del. 1973); *U.S.* v. *Kendall Co.* 324 F. Supp. 628 (D. Mass. 1971); *U.S.* v. *Stanack Sales Co.* 387 F. 2d 849 (3rd Cir., 1968).

[6] One floor leader of the bill noted that OSHA "emphasizes the preventative rather than the punitive aspect of job safety regula-

those cases, as with OSHA, are enforceable within the framework of a warrant procedure, based upon a reasonable standard of probable cause "designed to guarantee that a decision to search private property is justified by a reasonable governmental interest," without frustrating the "valid public interest" sought to be enforced. *Camara, supra*, 387 U.S. at 539. Accordingly, the same result reached by the Court in *Camara* and *See* must obtain here.

Nor can this compelling principle be overridden by alleging that simply because a person has chosen to engage in a business, and employs people in furtherance of that endeavor, he or she has voluntarily given up all reasonable expectations of privacy in that business. Indeed, such a strained reading of *Camara* and *See* would have the perverse effect of rendering the principle enunciated by the Court in those cases as the exception rather than the rule. It would not be an exaggeration to say, applying this rationale, that all warrantless searches are reasonable subject to a few jealously guarded exceptions. More important are the implications inherent in such reasoning. We would assume, carrying this approach to its logical conclusion, that a homeowner who employs a person in domestic service would then be subject to inspections under OSHA[7] or under an analagous state statute. Desks or safes to which a secretary routinely has access would likewise no longer be protected. Other examples are possible but the point to be made is that the legitimate public interest in protecting employees, while certainly pertinent in justifying the authority given the Secretary to conduct OSHA inspections, cannot be con-

tion" 116 Cong. Rec. 42,203 (1970) (remarks of Congressman Daniels).

[7] Congress long ago found that "the employment of persons in domestic service in households affects commerce." 29 U.S.C. 202(a), Fair Labor Standards Act of 1938.

trolling in determining whether such inspections may proceed without a warrant. See, *e.g.*, *Camara*, *supra*, at 533. Accordingly, unless some other justification is present, there is no basis for exempting OSHA inspections from the Fourth Amendment.

B. *The Imposition of a Warrant Requirement Will Not Frustrate the Purposes of the Act.*

It is asserted by the Secretary that an exception to the warrant requirement is compelled because the burden of obtaining a warrant would frustrate the governmental purpose behind the search. The rationale underlying this assertion is founded on the assumption that employers will receive the equivalent of advance notice of inspection, circumscribed by the Act (29 U.S.C. 651(b)(10)), thereby affording them sufficient time to temporarily conceal hazardous working conditions (Brief of Appellant at 38-39, 45). However, "the statute authorizes [inspection] regardless of any risk of concealment [and] simply does not focus on situations involving a need for rapid action." *G.M. Leasing Corp. supra*, 50 L. Ed. 2d at 546. Thus, in order to justify an exception on this ground, it must be demonstrated that to require a warrant in every type of search conducted pursuant to Section 657(a) of the Act, either in advance of inspection or only after consent is refused, would frustrate the aim of the Act. See, *Camara*, *supra*, 387 U.S. at 533-34; *See*, *supra*; *Almeida-Sanchez*, *supra*, 413 U.S. at 282-283 (Powell, J. concurring). The Secretary's own guidelines and the Act's overall enforcement scheme mitigate against such a finding.

Pursuant to the policies of the Act, the Secretary has divided OSHA inspections into four general categories of decreasing urgency and priority.[8] The highest priority is

[8] U.S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, 1 CCH ESHG ¶4327.2 (1976).

given to investigations of imminent dangers. Second come fatality/catastrophe investigations. Third come inspections initiated by employee complaints and last in priority are random, general schedule investigations, called Regional Programmed Inspections. This classification clearly demonstrates that surprise warrantless inspections are not vital to OSHA's overall enforcement scheme. In the case of imminent danger or catastrophe investigations, we assume that no warrant would be needed under the exception "traditionally upheld in emergency situations." (*Camara, supra*, 387 U.S. at 539). In the case of fatality or employee complaint inspections, probable cause could easily be established, and a warrant obtained, by submitting to the magistrate the fatality report prepared by the employer (29 C.F.R. § 1904.8) or the employee complaint, so entry need never be delayed.[9]

Thus, when properly focused, the Secretary's argument seeks "to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy made in furtherance of [the Act]" (*G.M. Leasing Corp. supra*, 50 L. Ed. 2d at 547), based solely on the assumption that surprise routine inspections, where "there is no compelling need to inspect at a particular time or on a particular day," (*Camara, supra*, 387 U.S. at 539), are crucial to the Act's purposes. Implicit in this argument is the assumption that employers are sufficiently familiar with the voluminous standards promulgated by the Secretary to take advantage of the relatively small delay involved in obtaining a warrant to inspect.[10] Such an assumption is unfounded.

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[9] The magistrate's review of warrant requests would serve to insure that the procedural safeguards of the Act will be adhered to, and would otherwise guarantee that the inspection is not arbitrary, harassing or otherwise unlawfully motivated. The Act itself provides no such guarantees. These considerations may be reviewed without reviewing the policy behind inspection.

[10] Meeting the probable cause standard enunciated by the Court in *Camara* would not impose a burden on the Secretary. 387 U.S. at 537-538. See, *e.g. Marshall* v. *Ciromalloy American Corp.*, Civil Action No. 77-C-291 (E.D. Wisc., July 12, 1977); *Usery* v. *Northwest Airlines, Inc.*, No. 76-C-2177 (E.D. N.Y. July 10, 1977).

In addition to being required to keep his workplace free from "recognized hazards," 29 U.S.C. 654(a)(1), a term not subject to precise definition,[11] an employer must also comply with approximately 4,400 health and safety standards, with 2,100 applying to all industries and the remainder to construction and maritime industries. 29 U.S.C. 654(a)(2); 29 C.F.R. § 1910 *et seq.* These standards range from those that have been characterized as vague,[12] to those for which a layman must find it difficult to assess his compliance.[13] It therefore seems safe to say that these standards, for the most part, apply to "conditions [which] may not be apparent to the inexpert [employer]," (*Camara, supra*, 387 U.S. at 537) and which would be "relatively difficult to conceal or correct in a short period of time." *United States* v. *Biswell, supra*, 406, U.S. at 315.

Even assuming, *arguendo*, that an employer were able to identify and correct all possible violations while a warrant is obtained, then the principle purpose of the Act, abatement of hazardous conditions, will have been achieved. However, it is argued that such abatement

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[11] See, *e.g. American Smelting and Refining Corp.* v. *OSHRC*; 501 F. 2d 504 (8th Cir. 1974); *National Realty and Construction Company* v. *OSHRC*, 489 F. 2d 1287 (D.C. Cir. 1973).

[12] 29 C.F.R. § 1910.132(a) which requires the use of personal protective equipment "by reason of hazards of processes or environment" has been called "not a model of perfect precision." *Ryder Truck Lines* v. *Brennan*, 497 F. 2d 230 (5th Cir. 1974).

[13] Of the 140-odd standards pertaining to portable wood ladders, the following illustrates the point, 29 C.F.R. § 1910.25(b)(3)(ii):

The general slope of grain and that in areas of local deviations of grain shall not be steeper than 1 in 15 in rungs and cleats. For all ladders cross grain not steeper than 1 in 12 are permitted in lieu of 1 in 15, provided the size is increased to afford at least 15 percent greater calculated strength for ladders built to minimum dimensions. Local deviations of grain associated with otherwise permissible irregularities are permitted.

may only be temporary and will allow an employer to escape liability. But this argument ignores the other provisions of the Act that are designed to deal with just such a possibility. Indeed, Section 658(a) requires that a citation for violation be issued "[i]f upon inspection *or investigation* the Secretary *believes*" that a violation of the Act has occurred. (Emphasis added). Such belief, therefore, obviously need not depend on actual observation of the violation. In fact, the Secretary's interpretation of this provision specifically provides that:

> [W]here the [inspector's] inspection or investigation reveals a violative condition to which the employer's employees were actually or potentially exposed *in the past* . . . a citation should be issued.[14] (Emphasis added).

Information pertaining to previous violations may be obtained during the course of interviews with employees. 29 U.S.C. 657(a)(2). Indeed, the Secretary completely ignores the role of employees in the enforcement of the Act. Section 659(b)(1) specifically encourages employees in the effort to reduce hazardous conditions, and Section 660(c) provides them with complete protection against any retaliation for securing their rights under the Act. Accordingly, it is not surprising to find that the Secretary's guidelines suggest that an employee's statement be taken "[w]hen advance notice has been given and there is reason to believe a violation would have existed at the time of inspection if advance notice had not been given." [15]

Once a citation has been issued the purposes of the Act are fulfilled. If an employer fails to contest,[16] it is

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[14] *Field Operations Manual, supra,* 1 CCH ESHG ¶ 4380.4.

[15] *Field Operations Manual, supra,* at ¶ 4330.4.

[16] See, 29 U.S.C. 659(a). If not contested within fifteen days, the citation becomes an unreviewable final order.

unlikely that he or she will allow the condition to deteriorate and risk a penalty of ten thousand dollars for a repeated violation. 29 U.S.C. 666(a). Thus, the advance notice afforded by a warrant does not signal a reprieve to those few employers who may seek to avoid their responsibilities under the Act.

When viewed within the overall statutory framework, the Secretary's argument of burden based on concealment and avoidance does not rise to the level of a burden that would frustrate the purposes of the Act, but rather to the level of inconvenience based on lack of budget and manpower (Brief of Appellant at 40-41). However, "inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement." *Almeida-Sanchez, supra,* 413 U.S. at 283 (Powell, J. concurring). While the problem is not to be ignored, the remedy should be sought through legislative means and not in the context of seeking a broad exemption from constitutional safeguards.

C. *OSHA Does Not Fall Within the Carefully Limited Exception to the Fourth Amendment.*

It is clear beyond cavil that "warrantless searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment subject only to a few jealously limited and carefully guarded exceptions." *Youghiogheny and Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45, 50 (S.D. Ohio 1973). In establishing this overriding principle, the Court in *See* expressly reserved comment on inspections conducted pursuant to a licensing program in a regulated industry (387 U.S. at 546). The constitutional validity of such a warrantless administrative inspection was raised in *United States* v. *Biswell,* 406 U.S. 311 (1972). In an extremely narrow decision, the Court held valid a warrantless search of a licensed gun dealer's locked pawnshop storeroom pursuant to Sec-

tion 923(g) of the Gun Control Act of 1968, 18 U.S.C. § 921 *et. seq.*, because of the "pervasively regulated" nature of the gun sales industry. In applying the rationale of its earlier decision in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)[17] the Court noted that the "inspection system aimed at federally licensed dealers in firearms . . . is not as deeply rooted in history as is governmental control of the liquor industry" but determined that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the states in regulating firearms traffic within their borders" (406 U.S. at 315). In further defining the parameters of its holding, the Court, in language equally applicable to OSHA, noted:

> [T]he mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short period of time. *Periodic inspections sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the inspection system there at issue.* (Emphasis added) *Id.* at 316.

Thus, upon considering the easy concealability and portability of firearms and ammunition, and the fact that the items subject to inspection were required by law to be maintained on the premises, the Court concluded:

> *In this context*, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope and frequency is to be preserved, the protection afforded by a warrant would be negligible. It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. *When a dealer chooses to engage in this pervasively regulated business and to accept a federal license*, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." *Id.*, at 316 (Emphasis added)

[17] The Court held that a statutorily authorized administrative search of a business possessing a liquor license did not offend the Fourth Amendment because it involved an "industry long subject to close supervision and inspection . . ." 397 U.S. at 77.

The exception thus contemplated by the Court is quite clear and extremely limited; in order for a warrantless search to be considered reasonable it may be authorized only if the business establishment is engaged in a "pervasively regulated business" where "urgent federal interests" are at stake, *and* only if surprise inspections are deemed vital to the regulatory scheme and pose only a limited threat to justifiable expectations of privacy. *U.S.* v. *Biswell, supra*, at 317.

In applying this test to OSHA it is clear that no such exception is justified. The scope of OSHA is so broad, covering as it does every business affecting commerce (29 U.S.C. § 652(5)), that it cannot seriously be contended that OSHA encompasses only businesses historically subject to pervasive regulation and inspection which have implicitly consented to reasonable searches in furtherance of the public interest. Nor can this burden be overcome by reliance upon the Walsh-Healy Act of 1936, 41 U.S.C. § 35 *et seq.*, or upon pre-existing national consensus standards (Brief of Appellant at 43). The Walsh-Healy Act applied only to those employers who voluntarily undertook to be federal contractors and suppliers and thereby knowingly consented to inspections. As for the argument that national consensus standards were widely distributed and familiar to all businesses, the following comment by former Chairman (now Commissioner) Bar-

nako of the Occupational Safety and Health Review Commission is appropriate:

> "[T]he standards were drafted as recommendations for optimal workplace safety and health without any idea that they would or should become law. And they were not drafted by industry consensus but frequently by representatives of selected industries for those industries. That is, some were vertical and some were horizontal. All of industry was not represented on all committees, nor did other industries object to the standards as published because such standards were of no concern to them." [18]

Moreover, as has already been demonstrated, there is simply no support for the argument that the requirement of a warrant for routine, random inspections is inimical to the Act's regulatory scheme. This is particularly valid to OSHA where, unlike *Biswell*, there is no basis for believing that the object of the inspection, hazardous conditions, is to be found on the premises.

Thus, the cases relied upon by the Secretary to support a Fourth Amendment exception to OSHA are inapposite, for they are limited to carefully defined contexts and purposes.[19] Accordingly, reliance upon "the reasoning of *Biswell* and *Colonnade* [which] cases involved voluntary participation in a highly regulated activity . . . is [in]sufficient to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy

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[18] Barnako, Enforcing Job Safety: *A Managerial View*, Monthly Labor Review, March, 1975 at 37.

[19] *Terraciano* v. *Montanye*, 493 F. 2d 682 (2d Cir. 1974) (statutorily authorized inspection of licensed pharmacist's drug records); *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 49-50 (S.D. Ohio 1973) (inspection of coal mine conducted pursuant to statute); *United States* v. *Business Builders*, 354 F. Supp. 141 (N.D. Okl. 1973) (warehouse containing federally regulated food products inspected pursuant to federal statute); *United States* v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1377 (D. Del. 1972) (statutorily authorized inspection of bakery business).

made in furtherance of [OSHA]." *G.M. Leasing Corp., supra*, 50 L. Ed. at 547.

Indeed, any confusion over Congressional authority to nullify the Fourth Amendment by simply authorizing warrantless inspections in any area of legitimate federal concern was finally laid to rest by the Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). The Court declined the government's invitation to extend its ruling in *Biswell* to cover random area searches of automobiles for the illegal importation of aliens, noting that such a search "embodies precisely the evil the Court saw in *Camara* when it insisted" that a warrant be obtained. 413 U.S. at 270. The Court reiterated its limitation of *Biswell* stating that ". . . businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . ." 413 U.S. at 271. The Court continued:

> Moreover, in *Colonnade* and *Biswell*, the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns. In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny . . .

The Court recognized that controlling unlawful entry of aliens was an important problem of national concern but refused to expand further the infringement of basic rights by concluding: "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 413 U.S. at 274.

As the preceding discussion has demonstrated, there is simply no basis in law or fact that would justify placing the inspection provisions of OSHA outside the protection

afforded by the Fourth Amendment, and the vast majority of those courts that have specifically faced this issue have so held.[20] The decision of the court in *Brennan* v. *Gibson Products, supra*, 407 F. Supp. 154, on which the other decisions rely, is most instructive. After conducting an analysis similar to the foregoing, the court noted: "OSHA's sweep is broad and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all 'environments' these employees work." 407 F. Supp. at 161. The court then dealt with the argument that OSHA fits within the exceptions enunciated in *U.S.* v. *Biswell, supra*:

> By contrast, the discount house which is the target here is not licensed, it has no history of close regulation, and the OSHA provisions appearing facially to authorize the search are in no sense limited in their application to such businesses. Nor is there any reason whatever, let alone a certainty, to believe that the thing sought to be controlled—hazardous working conditions—exists in the area to be searched. A finding by Congress that such conditions exist in most enterprises subject to OSHA might throw a different light on the subject, but there was none and we doubt there could have been.
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> This warrantless search would not comply with Fourth Amendment standards and cannot be countenanced. (407 F. Supp. at 162)

That similar results have been reached by so many courts, and are concurred with by legal scholars,[21] leaves

[20] See cases cited, *supra* at 7.

[21] See, Note *Brennan* v. *Buckeye Industries, Inc.: The Constitutionality of an OSHA Warrantless Search*, 1975 Duke L. J. 406; Comment, *The Validity of Warrantless Searches Under The Occupational Safety and Health Act of 1970*, 44 Cinn. L.R. 105 (1975).

little doubt as to the applicability of the Fourth Amendment to OSHA. Accordingly, the lower court's decision to this effect should be affirmed.

II. THE CONTEMPORANEOUS ADMINISTRATIVE REGULATIONS AND GUIDELINES OF THE SECRETARY OF LABOR SUPPORT THE DECISION BELOW THAT INSPECTIONS MAY ONLY BE ENFORCED THROUGH THE ISSUANCE OF A WARRANT.

Significantly overlooked in the briefs of Appellant and Amici on his behalf is the fact that the contemporaneous administrative pronouncements of the official charged with the responsibility of administering the Act specifically direct a compliance officer who is not permitted to make an inspection to leave the premises and begin the process of obtaining a warrant. To the extent that the Secretary of Labor now argues that these regulations and interpretations, which remained unchanged for four years from the date of enactment of OSHA, are erroneous or in conflict with more recent guidelines, his position is in direct contradiction to applicable decisions of this Court.

Within a year of the enactment of OSHA, the Department of Labor issued interpretive regulations which specifically set out the procedure to be followed by a compliance officer who is denied permission to inspect. Indeed, the pertinent regulation, 29 C.F.R. § 1903.4, is entitled "Objection to Inspections."[22]

The regulation provides:

> Upon refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect

[22] Originally published at 36 Fed. Reg. 17850 (September 4, 1971).

> . . . the . . . Officer shall terminate the inspection . . . The . . . Officer shall immediately report the refusal . . . to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director *and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary.* (Emphasis added)

Shortly thereafter, in January of 1972, the Secretary of Labor issued a manual which was clearly intended as an official interpretation of the formal regulation, to be used by those to whom the Secretary had delegated the authority to inspect.[23] The relevant section, significantly entitled, "Refusal to Permit Inspection-Warrants" provides:

> b. In cases where a CSHO encounters a refusal to permit entry, he should advise his Area Director, who will in turn refer the matter to the appropriate Regional Administrator *and the Regional Solicitor with a request that an inspection warrant be obtained.* (Emphasis added)
>
> c. If an employer refuses to permit an inspection the CSHO . . . will leave the premises and shall immediately report the refusal . . . to the Area Director. The AD shall immediately consult with the Regional Administrator and the Regional Solicitor who shall promptly take appropriate action including compulsory process, if necessary.
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> e. In cases where entry has been allowed and the employer interferes with or limits an important aspect of the investigation, the CSHO should decide whether to complete the inspection to the extent possible, or to discontinue the inspection and through the Area Director alert the Regional Administrator, and

[23] U.S. Department of Labor, Occupational Safety and Health Administration *Compliance Operations Manual*, Ch. V at V-6 to V-8 (January, 1972).

> *request the Regional Solicitor to seek an inspection warrant.* For example, if the employer refuses to permit the walkaround or to permit the CSHO to examine records which are essential to the inspection, the inspection should be discontinued and an *inspection warrant* sought. . . . (Emphasis added)
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> f. In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, *a warrant should be obtained before the inspection is attempted.* Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted. (Emphasis added)
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> h. A warrant is a legal process issued by a United States Magistrate or a United States District Court Judge which will be directed to the CSHO authorizing the CSHO to conduct an inspection of premises which will be described in the warrant. . . . All questions arising concerning reasonableness of any aspect of an inspection conducted pursuant to a warrant shall be referred to the Solicitor's office.
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> i. When the CSHO receives a warrant authorizing his inspection of designated premises, he will give the conduct of such an investigation first priority. . . . Except in unusual circumstances which are cleared with the Regional Solicitor's office, *there shall be no advance warning to the employer of the fact either that a warrant has been secured or that inspection will take place pursuant to the warrant. . . .*[24] (Emphasis added)

[24] The Court in *See* v. *City of Seattle*, *supra*, 387 U.S. at 545 n.6 recognized that the "nature of the regulation involved" might necessitate the obtaining of a warrant without notice. To the extent that this procedure is followed, it belies Appellant's argument that em-

Subsequently, in July, 1974, fully *two years after* this Court's decision in *Colonnade* and *Biswell*, the Secretary re-issued a revised manual but nonetheless adopted *verbatim* the policy of the earlier guidelines requiring that an "inspection warrant" be obtained where entry is refused.[25] It seems beyond dispute that these sections from the interpretive regulations demonstrate the Secretary's contemporaneous recognition that not only could OSHA function within the framework of a warrant procedure, but also that it was not exempt from the Fourth Amendment's requirements. Indeed, it was not until September of 1975, long after the Secretary had assumed the position of advocate in litigation then pending on this issue,[26] that the policy was officially changed by substituting the words "compulsory process" and "court order" in lieu of an "inspection warrant." [27]

The Secretary now attempts to have this Court give judicial sanction to this latter, conflicting interpretation of his authority to conduct inspections. However, this disregard for the Labor Department's contemporaneous official interpretation is totally inconsistent with the analysis which this Court has applied in similar circumstances. In *General Electric Co.* v. *Gilbert*, 50 L. Ed. 2d 343 (1976), this Court recently rejected an interpretive guideline of an agency which was inconsistent with its earlier position:

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ployers will receive advance notice of inspection sufficient to enable them to correct or conceal any violations. Indeed, the employer will not know when the inspector will return with a warrant, or even if one is being secured.

[25] U.S. Department of Labor, OSHA *Field Operations Manual*, Ch. V at V-4 to V-5 (July, 1974).

[26] See, *e.g.*, *Brennan* v. *Gibson Products Inc.*, *supra*, 407 F. Supp. 154; *Dunlop* v. *Hertzler Enterprises Inc.*, *supra*, 418 F. Supp. 627.

[27] *Field Operations Manual*, Ch. V, at V-6, V-7 (September, 1975).

> We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-859, n. 25 (1975); *Espinoza* v. *Farah Mfg. Co.*, *supra*, 414 U.S. at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore*, *supra*. (*Id.* at 411).

The *Skidmore* standards are the ones which this Court should apply in weighing the Department of Labor's contemporaneous interpretations of its regulations against the "revised" policy now advocated in the Secretary's brief. Under those standards the weight to be given an administrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control." [28]

Applying this test to the Secretary's most recent guideline, to the extent it is now supported in his brief, it is clear that the interpretation "does not fare well under these standards. It is not a contemporaneous interpretation of [29 U.S.C. 657(a)], since it was first promulgated [four] years after the enactment of [OSHA]. More importantly, the [1975] guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute" and which was re-issued two years after the decision of this Court on which the agency now relies in support of a con-

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[28] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See also *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), where the Court rejected an argument of the Securities and Exchange Commission in an *amicus* brief which "flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release." *Id.* at 858 n. 25.

flicting position. *General Electric Co.* v. *Gilbert*, *supra*, 50 L. Ed. 2d at 358.

Clearly, the position which the Secretary assumed as advocate must not be allowed to override his contemporaneous interpretations of his authority to conduct inspections, which reflect a clear understanding of this Court's decisions defining the scope of Fourth Amendment protections. The Secretary as advocate should not be permitted to circumvent and ignore his own interpretation as administrator in this cavalier and unorthodox manner. As the district court aptly observed in *Brennan* v. *Gibson Products Inc.*, *supra*:

> Our independent interpretation of the statute is reinforced by the contemporaneous administrative construction of the statute, as evidenced by the requirement of an "inspection warrant" found in the Compliance Operations Manual and by the reference to "compulsory process" in 29 C.F.R. § 1903.4. Although the Administration has obviously changed its mind as to the necessity of a warrant, its initial and more contemporaneous interpretation is entitled to greater weight. 407 F. Supp. at 162. (Footnote omitted).

III. THE LOWER COURTS HOLDING THAT CONGRESS UNCONSTITUTIONALLY PROVIDED FOR WARRANTLESS INSPECTIONS IN VIOLATION OF THE FOURTH AMENDMENT IS SUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT.

As demonstrated in the foregoing analysis, the decision of the lower court and of all the other federal courts are unassailable with respect to the applicability of the Fourth Amendment to OSHA inspections. The court below is alone, however, in declining to infer a congressional intent to require a warrant and holding Section 657(a) of the Act unconstitutional. We are mindful of the Court's

guidance that congressional intent to dispense with warrant requirements must be explicit and not merely implied, see, *e.g. Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 77, and that the Court, without such explicit intent, will decline to give a statute a reading which "would call its constitutionality into serious question." *G.M. Leasing Corp.* v. *United States*, 50 L. Ed. 2d 530, 547. Nevertheless, we believe there is ample support for the conclusion reached below that no such requirement was ever intended.

In the minority views to the bill which was reported out of the House Committee on Education and Labor, which was eventualy rejected but which contained provisions governing inspections virtually identical to those eventually enacted into law, the following reservations were expressed:

> H.R. 16785 authorizes searches of employer establishments for safety and health violations. Such searches may be conducted *without a warrant* . . . Evidence so obtained may be used in a criminal prosecution . . . Lastly, it should be noted that the only way an employer may test the constitutional validity of the search provided for by this legislation is by risking a conviction for forcibly resisting the effort to inspect. (H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. at 55 (1970)).

That these fears were not unjustified is evidenced by the congressional debates on the purpose and scope of what is now Section 657(a) of the Act, wherein Representative Steiger, the author of the provision, engaged in a significant colloquy with one of his colleagues, Representative Galifianakis. The latter gentleman expressed his concern that "[u]nless the intent of these provisions is explained for the record, I fear that we may lose some of the effectiveness of this bill [H.R. 19200]." The following discussion ensued:

Question: Then I would ask the gentleman this: Is it legal, under the terms of H.R. 19200, for a low-ranking employee of a firm to leave a Federal inspector waiting at the entrance to a business simply by saying, "I am sorry, but I must locate the owner, operator, or agent in charge before you may present your credentials and enter." If that sort of evasion is legal under this bill, then we have lost the value of holding unannounced inspections.

Mr. Steiger: My answer is, that such an evasion is not legal under H.R. 19200. Under my bill, it would constitute interference with a Federal inspector subject to the criminal penalties of section 17(e). And I think the words "without delay," which appear in section 9(a)(1) of H.R. 19200, make it a stronger bill in this regard than the committee version.

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Question: And in the event that an "agent in charge" could not be located within a reasonable time, would the Federal inspector be able to gain entry by presenting his credentials to any other employee?

Mr. Steiger: I would say so. In general it is our intent in H.R. 19200 that the Federal inspector should gain entry to a business or workplace with an absolute minimum of delay. . . . The way we envision this provision as operating is that the inspector will present himself at the factory entrance and he will ask to see the agent in charge. The inspector will present his credentials to any employee who presents himself as the agent in charge. Now, if no person shows up stating that he is the agent in charge, then we do not intend that, under those circumstances, the inspector is going to wait an inordinate amount of time for such an agent to show up; and we certainly do not expect the inspector to give up and go back to his office. If none of the employees, purporting to be the agent in charge, shows up after a reasonable time, then we contemplate that the inspector, acting for the Secretary, could regard any employee as the agent in charge for the purpose of presenting credentials under the act.

I would add that in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable constitutional protections.[29]

Whatever the phrase "applicable constitutional protections" refers to, it is clear, given the context of the remark, that it does not envision the applicability of the Fourth Amendment to OSHA inspections. Moreover, this is not a case where "[t]he [Appellants] offer no legislative history in support of their reading" of the statute. *G.M. Leasing Corp.* v. *United States, supra,* 50 L. Ed. 2d at 547. Indeed, the legislative history cited by the Secretary leads to the inescapable conclusion that Congress intended to provide for warrantless inspections. Brief of Appellant at 20-22, 38.

To aver that Congress does not intend to pass unconstitutional legislation is tautologous. The foregoing demonstrates that Congress plainly exceeded its power by specifically authorizing such searches, and that the lower court was correct in refusing to judicially re-draft the statute. However, should the Court determine that "under familiar principles of the constitutional adjudication, [its] duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment" (*Almeida-Sanchez supra,* 413 U.S. at 272), then the Chamber respecfully submits that this Court must conclude, as have the vast majority of other lower federal courts, that such inspections are constitutionally valid "only when made by a search warrant issued by a United States Magistrate or

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[29] *Legislative History of the Occupational Safety and Health Act of 1970,* Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Session (1971) at 1075-1077.

other judicial officer . . . under probable cause standards appropriate to administrative searches . . ." *Gibson Products Inc., supra*, 406 F. Supp. at 162. Accord: *Usery* v. *Centrif Air, supra*, 424 F. Supp. at 962; *Dunlop* v. *Hertzler Enterprises, supra*, 418 F. Supp. at 634; *Usery* v. *Rupp Forge, supra*.

CONCLUSION

For the reasons set forth above, and those in the Appellee's brief, it is respectfully requested that the judgment of the lower court be affirmed.

Respectfully submitted,

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